Francis Damien Murphy v Raymond Chan Boon Siew

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22NCVC-591–11 OF 2015
FAIZAH JAMALUDIN JC
26 SEPTEMBER 2017

Moneylenders — Illegal moneylending — Sums advanced alleged to be investments for profit — Plaintiff claimed for return of balance of monies — Plaintiff invested in defendant's development projects — Whether transaction between plaintiff and defendant illegal moneylending transaction — Moneylenders Act 1951

The plaintiff claimed for the return of balance of monies amounting to RM6,327,517.36. The plaintiff was introduced to the defendant through his solicitor ('P1'). The plaintiff had said that he invested RM10m in the defendant's development projects. The defendant had issued two postdated cheques to the plaintiff as return for the sums of monies given. The two cheques however were not honoured by the defendant. The statements of account prepared by the defendant's accountant ('Ms Amy') stated that as at 21 March 2015, the amount outstanding was RM8,403,500.68 and as at 8 August 2015, the outstanding sum of RM6,158,783.56 remain due and owing by the defendant to the plaintiff. The defendant pleaded that the plaintiff did not have any moneylending licence under the Moneylenders Act 1951 ('the Act') and that the agreement for profit in the form of interest was illegal and unenforceable. The issues before the court were: (a) the amount received by the defendant from the plaintiff and the purpose of payment; (b) the amount owing by the defendant to the plaintiff; (c) the guaranteed profit return owing; and (d) whether the transaction between the plaintiff and the defendant was an illegal money lending transaction under the Moneylenders Act 1951.

Held, allowing the plaintiff's claim and ordering the defendant to pay the plaintiff RM6,327,517.36 with interest of 5%pa and costs of RM30,000 subject to allocator:

(1) The two statements of accounts prepared by Ms Amy showed that the total principal amount owing was RM10m. The judicial commissioner was not convinced of the veracity of the defendants claim that he had paid SP1 a commission of RM625,000 and paid the plaintiff the sum of RM1,212,500 from the RM10m received from the plaintiff (see paras 46 & 48).

(2) It was found on a balance of probabilities that: (a) the plaintiff had provided the sum of RM10m to the defendant for investment in the

defendant's development projects; (b) the amount owed by the defendant to the plaintiff as at 22 July 2015 was RM6,158,783.56; (c) the guaranteed profit rate of return payable on the outstanding sum was 10%; and (d) the guaranteed profit return owed by the defendant to the plaintiff s at 29 October 2015 was the sum of RM168,733.80 (see para 49).

(3) Section 5 of the Act, prohibits any person who is not licensed under the act from carrying on, advertising, announcing or holding himself out as carrying on the business of moneylending. Contrary to learned defence counsel's submission, s 5 of the Act did not prohibit any person who is not licensed under the Act from lending money with interest. The plaintiff was not a moneylender as defined in the Act and was not required to have a license under the act to lend money for interest. The transaction between the plaintiff and the defendant was not rendered illegal or unenforceable by the fact that the plaintiff did not have a license under the act or that the profit return or interest of 10% was payable on the outstanding sum (see paras 52 & 60).

(4) The defendant had not provided evidence to show that the plaintiff was a moneylender or that the money invested with or loaned to the defendant was a moneylending transaction within the definition of the Act. The defendant had failed to establish that at the material time the plaintiff was a moneylender or that the plaintiff carried on or advertised or announced himself or held himself out in any way as carrying on the business of moneylending (see paras 58–59).

[Bahasa Malaysia summary

Plaintif telah menuntut untuk pulangan baki wang berjumlah RM6,327,517.36. Plaintif telah diperkenalkan kepada defendan melalui peguamcaranya ('P1'). Plaintif telah mengatakan bahawa di telah melabur RM10 juta dalam projek pembinaan defendan. Defendan telah mengeluarkan dua cek bagaimanapun tidak ditunaikan oleh defendan. Penyata akaun disediakan oleh akauntan defendan ('Ms Amy') menyatakan bahawa sehingga 21 Mac 2015, jumlah tertunggak adalah RM8,403,500.68 dan sehingga 8 Ogos 2015, jumlah tertunggak adalah RM6,158,783.56 yang tetap kena dibayar dan terhutang oleh defendan kepada plaintif. Defendan mempli bahawa plaintif tidak mempunyai lesen pinjaman wang di bawah Akta Pinjaman Wang 1951 ('Akta tersebut') dan bahawa perjanjian untuk keuntungan dalam bentuk faedah adalah menyalahi undang-undang dan tidak boleh dikuatkuasakan. Isu-isu di hadapan mahkamah adalah: (a) jumlah yang diterima oleh defendan daripada plaintif dan bagi tujuan bayaran; (b) jumlah terhutang oleh defendan kepada plaintif; (c) pulangan keuntungan terhutang yang dijamin; dan (d) sama ada transaksi antara plaintif dan defendan adalah transaksi pinjaman wang yang menyalahi undang-undang di bawah Akta Pinjaman Wang 1951.

Diputuskan, membenarkan tuntutan plaintif dan memerintahkan defendan membayar plaintif RM6,327,517.36 beserta faedah 5% setiap tahun dan kos RM30,000 tertakluk kepada alokator:

(1) Dua penyata akaun yang disediakan oleh Ms Amy menunjukkan bahawa keseluruhan jumlah pokok yang terhutang adalah RM10 juta. Pesuruhjaya kehakiman tidak yakin dengan kebenaran tuntutan defendan bahawa dia telah membayar SP1 komisen RM625,000 dan membayar plaintif sejumlah RM1,212,500 dariapda RM10 juta yang diterima daripada plaintif (lihat perenggan 46 & 48).

(2) Ia didapati atas imbangan kebarangkalian bahawa: (a) plaintif telah memperuntukkan jumah RM10 juta kepada defendan untuk pelaburan dalam projek-projek pembinaan defendan; (b) jumlah yang terhutang oleh defendan kepada plaintif sehingga 22 Julai 2015 adalah RM6,158,783.56; (c) kadar keuntungan yang dijamin boleh dibayar untuk jumlah tertunggak adalah 10%; dan (d) pulangan keuntungan dijamin yang terhutang oleh defendan kepada plaintif sehingga 29 Oktober 2015 berjumlah RM168,733.80 (lihat perenggan 49).

(3) Seksyen 5 Akta tersebut, melarang mana-mana orang yang tidak berlesen di bawah Akta tersebut daripada menjalankan, mengiklankan, mengumumkan atau mengemukakan dirinya sebagai menjalankan perniagaan pinjaman wang. Bertentangan dengan hujah peguam pembelaan, s 5 Akta tersebut tidak melarang mana-mana orang yang tidak berlesen di bawah Akta tersebut daripada meminjam wang beserta faedah. Plaintif bukan peminjam wang sepertimana ditafsirkan dalam Akta tersebut dan tidak dikehendaki mempunyai lesen di bawah Akta tersebut untuk meminjam wang untuk faedah. Transaksi antara plaintif dan defendan tidak menjadi suatu yang menyalahi undang-undang atau tidak boleh dikuatkuasakan oleh fakta bahawa plaintif tidak mempunyai lesen di bawah Akta tersebut atau bahawa pulangan keuntungan atau faedah 10% boleh dibayar ke atas jumlah tertunggak (lihat perenggan 52 & 60).

(4) Defendan tidak megemukakan keterangan untuk menunjukkan bahawa plaintif adalah peminjam wang atau bahawa wang yang dilabur dengan atau dipinjamkan kepada defendan adalah transaksi pinjaman wang dalam tafsiran Akta tersebut. Defendan telah gagal membuktikan bahawa pada masa matan plaintif adalah peminjam wang atau bahawa plaintif telah menjalankan atau mengiklankan atau mengumumkan dirinya atau mengemukakan dirinya dalam apa cara sebagai menjalankan perniagaan pinjaman wang (lihat perenggan 58–59).]

Notes

For a case on sums advanced alleged to be investments for profit, see 10(1) *Mallal's Digest* (5th Ed, 2017 Reissue) para 565.

Cases referred to

Chow Yoong Hong v Choong Yah Rubber Manufactory [1962] 1 MLJ 74, PC (refd)

Grace Shipping Inc & Anor v CF Sharp & Co (Malaya) Pte Ltd [1987] 1 MLJ 257, PC (refd)

Ngui Mui Khin & Anor v Gillespie Bros & Co Ltd [1980] 2 MLJ 9; [1979] 1 LNS 60, FC (refd)

Pan Global Equities Sdn Bhd & Anor v Taisho Co Sdn Bhd [2006] 1 MLJ 158, CA (refd)

Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)

Legislation referred to

Companies Regulation 1966 Form 32A

Evidence Act 1950 s 103

Moneylenders Act 1951 ss 2, 5, 5(1)

Jason Ng Kau (Khong Zhi Jian, Ng Yew Wei and Gay Meixin with him) (Jason Ng & Partners) for the plaintiff.

Arun Kasi (Rusmah Arunan & Assoc) for the defendant.

Faizah Jamaludin JC:

INTRODUCTION

[1] These are my grounds of judgment with respect to the plaintiff's suit against the defendant for the return of balance of monies, which the plaintiff says he had invested with the defendant, and the profit return guaranteed by the defendant on the investment.

[2] The plaintiff is a citizen of the Republic of Ireland who lives and works in Malaysia. He is a director and majority shareholder of Vast Consortium Sdn Bhd, a Malaysian incorporated property development company. The defendant is a Malaysian businessman who says that at the material time he has more than 70 companies. It is unclear, however, whether he is a shareholder or director or both of all these 70 companies.

[3] The plaintiff's claim against the defendant, as stated in the *writ saman* and *penyata tuntutan*, is for:

(a) Jumlah tunggakan sebanyak RM6,332,579.36;

(b) Faedah sebanyak 5% setahun dari tarikh pemfailan Writ Saman ini sehingga penyelesaian penuh penghakiman;

(c) Kos-kos;

(d) Lain-lain Perintah dan/atau relif and/atau arahan selanjutnya yang difikirkan sesuai dan patut oleh Mahkamah yang Mulia ini.

[4] However, in the statement of claim, which is the English translation of the *penyata tuntutan*, the plaintiff's claim against the defendant is as below:

(a) the sum of RM6,327,517.36;

(b) interest of 5%pa from the date of this suit until the date of the judgment delivered by this honourable court;

(c) interest of 5%pa from the date of the judgment delivered until full settlement of the judgment sum;

(d) costs on the client and solicitors basis; and

(e) any further or other reliefs, which this honourable court deems fit and proper.

[5] The amount of RM6,332,579.36 as prayed in the *penyata tuntutan* is made out of the principal sum of RM6,158,783.56, which the plaintiff claims is owed by the defendant and guaranteed profit return at the rate of 10% at 3 November 2015 for the sum of RM173,795.80. The amount of RM6,327,517.36 as prayed in the statement of claim is made out of the same amount of principal sum owing of RM6,158,783.56 and the guaranteed profit return at the rate of 10% at 29 October 2015 for the sum of RM168,733.80.

[6] At trial, before I delivered my judgment in this suit, I sought clarification from the plaintiff's counsel as to which amount the plaintiff is claiming from the defendant: RM6,332,579.36 as prayed in the *penyata tuntutan* or RM6,327,517.36 as prayed in the statement of claim? Counsel for the plaintiff confirmed that the plaintiff is praying for the principal sum he claims is owed to him plus the guaranteed profit return on the principal sum as at 29 October 2015 ie RM168,733.80. Therefore, the amount the plaintiff is claiming from the defendant is the lower amount of RM6,327,517.36 prayed in the statement of claim. There was no objection from the defendant's counsel to the plaintiff's claim for the lower amount prayed in the statement of claim.

[7] The defendant's defence is that:

(a) he had received a net sum of RM8,162,500 from the plaintiff and not RM10m;

(b) out of the RM10m the plaintiff agreed to invest with him, he had paid an upfront amount of RM1,212,500 to the plaintiff as return on the investment and that RM625,000 of the sum received was paid to Mr Cheah Jiun Wau ('SP1') as a commission due from the plaintiff to SP1 for introducing the defendant to the plaintiff;

(c) he had repaid the sum of RM6,960,000 of the RM8,162,500. Therefore, the amount owing to the plaintiff is RM1,202,500; and

(d) the plaintiff is not entitled to claim any of the outstanding amount from the defendant because the lending is illegal under the Moneylenders Act 1951.

[8] It is not disputed that the defendant owes the plaintiff monies. The issues in dispute, which are before this court, are:

(a) the amount received by the defendant from the plaintiff and the purpose of the payment?

(b) the amount owing by the defendant to the plaintiff as at 22 July 2015;

(c) the guaranteed profit return owing as at 29 October 2015; and

(d) whether the transaction between the plaintiff and the defendant is an illegal money lending transaction under the Moneylenders Act 1951.

BACKGROUND FACTS

[9] The plaintiff was introduced by his solicitor, SP1, to the defendant and was advised by SP1 to invest in the defendant. He met the defendant with SP1 and the defendant informed the plaintiff that he was looking for investors for his 1Gateway Klang, Bundle B3 pp 13–48 ('1Gateway') and the 1Gateway Halimah, Bundle B3 pp 49–77 ('Halimah') property development projects.

[10] SP1 testified that he knew the defendant about a year before introducing him to the plaintiff and that he had invested in some of the defendant's investment schemes. SP1 said that he introduced some of his clients to the defendant and that he had introduced the defendant to the plaintiff because SP1 knew that the plaintiff was interested in making investments in Malaysia and that the defendant 'has [sic] well experience [sic]' in property investment. SP1 denies that the reason he introduced the defendant to the plaintiff was because the defendant was looking for a loan or to borrow money.

[11] The plaintiff said that he had given the defendant a total sum of RM10m for investment in the defendant's projects. The plaintiff testified that the sums were given to the defendant in the months of May, June and August 2013 by way of bank transfers. However, none of the bank transfers were produced in court to prove the amount of money paid by the plaintiff to the defendant. The plaintiff testified that there was no written agreement between him and defendant because the arrangement was done based on trust:

He received the RM10m and you add on the other disbursements and expenses and it'll come up to the RM10m.

[12] The defendant testified that when he was introduced to the plaintiff he knew from SP1 that the plaintiff was a genuine developer. He said that he told the plaintiff that he needed some money for his Klang project and that the plaintiff agreed to lend him RM10m. The defendant said:

I introduced myself as a developer at that point.

...

Yes, I said I need some money, ok, for my Klang project. So I said that can you lend me because my SBLC didn't come forth. So then he agreed on a 10m.

[13] The defendant said that he was the director of the company involved in the development of 1Gateway and that he was lobbying for the Halimah development project. However, he said that he cannot recall whether he showed the plaintiff the brochures for the 1Gateway and Halimah property developments because 'the brochures are very common': they were widely distributed and can be downloaded from the website.

POST-DATED CHEQUES

[14] In return for the sums of monies given, the defendant had issued the plaintiff two post-dated cheques. The plaintiff testified that the defendant included the return on investment in the post-dated cheque when he received the monies from the plaintiff. Details of the post-dated cheques are as in Table 1 below:

NO	CHEQUE NO	DATE	TOTAL (RM)
1.	RHB 001848	10 October 2013	5,675,000
2.	RHB 001849	26 October 2013	5,675,000
TOTAL			11,350,000

TABLE 1

[15] The defendant testified that he had given the plaintiff the post-dated cheques as security for the monies he received from the plaintiff.

[16] It is not disputed that both the post-dated cheques were not honoured by the defendant. The plaintiff testified that three weeks before the cheques were due to be cashed, the defendant told him that he would not be able to honour the cheques and proposed that the plaintiff reinvest the sum of RM11,350,000 in a mixed commercial and residential development in Larkin, Johor Bahru ('Larkin project') at a reduced rate of return of 10%. The plaintiff agreed for the sum of RM11,350,000 to be reinvested in the Larkin project.

However, the plaintiff said that he aborted his participation in the Larkin project due to insufficient supporting documentation for the construction contract and non-compliance of the Johor state requirement in respect of the partnership structure.

[17] It is the plaintiff's case that after he withdrew his participation from the Larkin project, the defendant promised him that he will repay the total amount of RM11,350,000 and the guaranteed profit return of 10%pa until full payment of the outstanding sum.

[18] The defendant has made part-payment of the sums owing by way of instalments by issuing cheques to the plaintiff from time to time. Two of the defendant's cheques to the plaintiff were dishonoured: they were RHB cheques Nos 000300 and 000301 dated 21 February 2015 and 21 March 2015 for the sum of RM500,000 each. The letters from RHB Bank to the plaintiff, dated 24 February 2015 and 3 April 2015 respectively, stated that payments of both cheques were stopped, Bundle B1 pp 3–7.

LETTER FROM THE DEFENDANT TO THE PLAINTIFF DATED 13 APRIL 2015

[19] Shortly after the letter from RHB Bank to the plaintiff, notifying of the dishonour of RHB cheque No 000301, the defendant issued a letter dated 13 April 2015, (Bundle B1 p 8) to the plaintiff stating:

> Attn: Francis Damien Murphy
>
> Dear Sirs,
>
> I, Raymond Chan hereby agreed [sic] to release RM500,000 before 30th April & further agreed [sic] to effect [sic] the undertaking for the assignment of payment from Altrust International Pte Ltd (being the buyer for 1Likas & 1Gateway Klang) upto [sic] RM5,000,000 before 31st July 2015.
>
> The balance payment will be worked out upon settlement of this RM5,000,000 but not later than Nov 2015.
>
> Attached herewith is the summary payment made.
>
> Kindly note this new settlement scheme supercedes [sic] all previous arrangement [sic].
>
> Yours sincerely,
>
> ...
>
> Raymond Chan.

STATEMENTS OF ACCOUNT DATED 13 APRIL 2015 AND 22 JULY 2015

[20] Attached to the letter was a statement of account entitled 'Francis Damien Murphy-Loan Listing' prepared by the defendant's accountant, Ms Amy. The first statement of account dated 13 April 2015, (Bundle B1 p 9) that as 21 March 2015, the amount outstanding was RM8,403,500.68. A second statement of account dated 22 July 2015, also prepared by Ms Amy showed that as at 8 August 2015 (Bundle B1 p 10) the outstanding sum of RM6,158,783.56 remain due and owing by the defendant to the plaintiff. The statements of account show that the principal amount owing to the plaintiff was RM10m with an interest rate of 13.5% as at 10 October 2013 and 26 October 2013 respectively, and an interest rate of 10% thereafter. A summary of the statement of account dated 22 July 2015 is as below:

Principal amount:	RM10,000,00
Interest:	RM3,118,783
Less Payment:	(RM6,960,000)
Outstanding balance:	RM6,158,783.56

[21] The defendant admitted that he had prepared the letter and the signature on the letter is his. He also admitted that he didn't honour the promise he made in the letter and that he had defaulted on the loan. When asked by the plaintiff's counsel, the defendant said:

> The full promise was not honoured. I defaulted on the loan.

[22] The defendant testified that the statements of accounts are records of transactions between him and the plaintiff and that they were prepared based on bank-in slips. The defendant agreed that if he found that the figures were erroneous he would tell Ms Amy that they were not right. When asked by the plaintiff's counsel, Mr Khong Zhi Jian, whether the figures in the statements of account were true and accurate, the defendant replied:

> On the ballpark, yes.

Mr Khong also asked the defendant to confirm that the balance outstanding is RM6,158,783.56? The defendant replied:

> Yes, it appears on the book.

DRAFT LIEN AGREEMENT

[23] The defendant was referred to a draft lien agreement (Bundle B1 pp 13–17) where the parties named on the draft agreement were the plaintiff and company known as Unik Unggul Sdn Bhd ('Unik Unggul'). It was stated in the draft lien agreement that:

A (a) Unik Unggul owes the plaintiff the sum of RM6,159,000;

(b) the sum of RM6,159,000 will be repaid to the plaintiff by 31 December 2015 or such other extended date as mutually agreed by the parties;

B (c) Unik Unggul will transfer 45% of its shares to the plaintiff as collateral for the amount owing. There was attached to the draft agreement, an undated form of transfer of securities (Form 32A) transferring 180,000 shares for the sum of RM6,800,000 in Unik Unggul to the plaintiff. The undated Form 32A was signed by the defendant and was to be kept in escrow; and

C (d) the plaintiff is entitled to lodge a caveat against the properties owned by Unik Unggul detailed in the draft agreement.

The draft lien agreement was signed by the defendant and a Chan Boon Lim as directors of Unik Unggul.

D

[24] The Suruhanjaya Syarikat Malaysia company search results shows that Unik Unggul is dormant company, which is majority owned by the defendant.

E **[25]** The plaintiff in his witness statement stated that the defendant had attempted to entice him to take 45% shares in Unik Unggul as repayment of the debt owing by the defendant to the plaintiff. The defendant testified that he signed the draft lien agreement and gave it to the plaintiff as a way of reaching an amicable settlement with the plaintiff when he defaulted on the loan but the plaintiff never signed it or returned the draft agreement back to him.

F

EVALUATION AND FINDINGS OF THE COURT

[26] The trial of this case was held over three days on 19, 20 and 21 June 2017. The witnesses called were:

G

SPI	Mr Cheah Jiun Wau, the plaintiff's lawyer who introduced the plaintiff to the defendant
SP2	The plaintiff
SD1	The defendant

H

[27] The defendant did not call the maker of the statements of account, Ms Amy, who was an accounts executive/accounts manager at the defendant's company.

I **[28]** When asked by plaintiff's counsel why he did not call Ms Amy, the defendant replied that Ms Amy had resigned from his company two to three months before trial commenced. The defendant said that he had asked Ms Amy to reconcile the accounts and that he had told her last year that she is to come to court as a witness. He testified that he was unable to contact her

after she resigned. However, during re-examination he explained that he told his counsel, Mr Arun Kasi, that Amy had resigned and that Mr Kasi told him that there was no need call Ms Amy.

[29] Mr Kasi submitted during cross-examination of the defendant that the defendant is admitting the statements of account. He said:

> My Lady, we are admitting there's an exhibit. We are not disputing the document. In fact he as a director has signed the cover letter. He has to take responsibility and not every clerk and typist who is typing that ...

How much did the defendant receive from the plaintiff?

[30] It is evident from both the plaintiff's and defendant's testimonies that the plaintiff had agreed to invest the sum of RM10m in the defendant's projects.

[31] The question before this court is how much of the RM10m did the defendant receive. It is the plaintiff's case that he had given RM10m to the defendant to invest in the defendant's development projects. This is corroborated by the evidence given by SP1.

[32] In his defence, the defendant pleaded that he received RM8,787,500 from the plaintiff as an investment sum. After deducting SP1's commission of RM625,000, the net monies the defendant received from the plaintiff was RM8,162,500. He pleaded that the plaintiff will receive an interest rate of 10%.

[33] However, in his amended witness statement, the defendant stated that out of the RM10m he only received RM8,162,500 because: (i) he had given the plaintiff his profit return upfront in the sum of RM1,212,500 and received RM8,787,500 only; and (ii) out of the RM8,787,500, he had paid SP1 the sum of RM625,000, which was the commission due from the plaintiff to SP1 for introducing the defendant to the plaintiff.

[34] The defendant testified during the trial that the plaintiff had paid SP1 a commission of RM625,000 and that the defendant had paid SP1 a commission of RM675,000 for introducing the plaintiff to the defendant. The defendant produced copies of the following remittance form and cheques (Bundle B2 pp 1–4) as evidence of his payments of the commission to SP1:

NO	DOCUMENT	DATE	PAYEE	AMOUNT
1.	RHB Cheque No 000245 Payer: Raymond Chan	2 October 2014	Cash	RM300,000

NO	DOCUMENT	DATE	PAYEE	AMOUNT
2.	Remittance Form Payer: Sagajuta Sdn Bhd Purpose: Refund Deposit	2 October 2014	Cheah Jiun Wau	RM300,000
3.	RHB Cheque No 000264 Payer: Raymond Chan	28 October 2014	Cheah Jiun Wau	RM200,000
4.	RHB Cheque No 002038 Payer: Raymond Chan	1 December 2014	Cheah Jiun Wau	RM500,000

TABLE 2

[35] The defendant claims that the amounts detailed in Table 2 above are commissions totalling RM1.3m paid to SP1 by the plaintiff and the defendant for introducing the plaintiff to the defendant.

[36] The plaintiff denies giving SP1 any commission for the introduction. SP1 also denied receiving any commission for introducing the plaintiff to the defendant.

[37] SP1 testified that the amounts of monies paid to him in Items 2, 3 and 4 in Table 2 above were refunds of his investments with the defendant. He denies that they were commissions for introducing the plaintiff to the defendant. He also denies receiving the amount in Item 1. Item 1 is a cash cheque from the defendant's personal account on the same date (2 October 2014) and for the same amount (RM300,000) as on the remittance form (Item 2) from Sagajuta Sdn Bhd to SP1.

[38] The oral evidence of the defendant contradicts with the oral evidence given by the plaintiff and SP1 as to the amount of monies given by the plaintiff to the defendant and the amount owing by the defendant as at 22 July 2015.

[39] It is a well-established rule of evidence that the veracity of oral evidence may be tested by reference to the contemporaneous documentary evidence. This rule was clearly expressed by the Federal Court in *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 and in *Grace Shipping Inc & Anor v CF Sharp & Co (Malaya) Pte Ltd* [1987] 1 MLJ 257, which was a Privy Council Appeal from Singapore. Chang Min Tat FJ in delivering the judgment of the Federal Court in *Tindok Besar Estate* said (at p 234):

> Nevertheless, the learned trial judge expressed himself to be completely satisfied with the veracity of the respondent's witnesses and their evidence. He purported to

come to certain findings of fact on the oral evidence but did not notice or consider that the respondent's oral evidence openly clashed with its contemporaneous documentary evidence. *For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings.* Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity. (Emphasis added.)

[40] Lord Goff of Chieveley (at p 265) in *Grace Shipping Inc & Anor v CF Sharp & Co (Malaya) Pte Ltd* [1987] 1 MLJ 257 in delivering the judgment of the Privy Council said:

> And it is not to be forgotten that, in the present case, the judge was faced with the task of assessing the evidence of witnesses about telephone conversations which had taken place over five years before. In such a case, memories may very well be unreliable; and *it is of crucial importance for the judge to have regard to the contemporary documents and to the overall probabilities*. In this connection, Their Lordships wish to endorse a passage from a judgment of one of their number in *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1985] 1 Lloyd's Rep 1, when he said at p 57:
>
> > Speaking from my own experience, *I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities.* It is frequently very difficult to tell whether a witness is telling the truth or not; and *where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth*.
>
> That observation is, in Their Lordships' opinion, equally apposite in a case where the evidence of the witnesses is likely to be unreliable; and it is to be remembered that in commercial cases, such as the present, there is usually a substantial body of contemporary documentary evidence. (Emphasis added.)

[41] In determining which evidence is more probable, I have compared the oral evidence of SP1, the plaintiff and the defendant with the available contemporaneous documents, namely:

(a) the post-dated cheques in Table 1;

(b) the payments which the defendant claims were commissions to SP1 detailed in Table 2;

(c) the defendant's letter to the plaintiff dated 13 April 2015; and

A (d) the statements of accounts; and

(e) the draft lien agreement.

B Although the draft lien agreement was never executed between the plaintiff and Unik Unggul, like the statements of account, it is a contemporaneous document which records the amount the defendant says is owed to the plaintiff.

C **[42]** In comparing the parties' oral testimony with the available contemporaneous documents, the question I ask myself is, if the defendant had only received a net sum of RM8,162,500 from the plaintiff as he claims, why did he give the plaintiff post-dated cheques totalling RM11,350,000 (detailed in Table 1 above) as security/collateral? RM11,350,000 is 39.05% more than RM8,162,500 and 13.5% more than RM10m. The defendant in his witness D statement (WSSD1, answer to Q5) had stated that he thought the initial interest rate of 13.5% was too high and had capped the interest rate for the first year at RM1,212,500. If he thinks the rate of 13.5% is high, surely, he must think that the rate of 39.05% is even higher? Also, when the cheques were E dishonoured why did the defendant propose that the plaintiff reinvest a sum of RM11,350,000 instead of RM8,162,500, which he claims was the net amount he received from the plaintiff?

F **[43]** I find that the defendant's claim that the sum of RM1.3m detailed in Table 2 above were commissions paid to SP1 for introducing the defendant to the plaintiff highly improbable. If indeed the sum RM625,000 was deducted upfront from the RM10m as commission payable to SP1, why was it only paid to SP1 in October and December 2014, which is more than one year after the plaintiff gave the monies to the defendant? Why was it not paid in May, June G or August 2013 when the plaintiff said he gave the monies to the defendant or in October 2013 — the date of the two post-dated cheques the defendant had given to the plaintiff as security?

[44] Also, if the defendant only owed the plaintiff a sum of RM1,202,500, H why did he promise in his letter of 13 April 2015 to pay the plaintiff a sum of RM5.5m by 31 July 2015 and the balance by Nov 2015 and state in the draft lien agreement that Unik Unggul owes the plaintiff the sum of RM6,159,000?

[45] Furthermore, the defendant did not plead in his defence that he had I paid the plaintiff his profit return upfront in the sum of RM1,212,500 neither did he provide any documentary evidence to support his claim. The claim was only made in his amended witness statement and his oral testimony.

[46] Additionally, both the statements of accounts prepared by Ms Amy, the

defendant's own accounts executive/accounts manager show that the total principal amount owing is RM10m. The defendant had testified in cross-examination that the statements of account were prepared by Ms Amy on his instructions based on bank-in slips and that they were accurate and true.

[47] The second statement of account shows that as at 22 July 2015, the amount owing by the defendant to the plaintiff is RM6,158,783.56. This figure was rounded up to RM6,159,000 in the draft lien agreement between the plaintiff and Unik Unggul, which was prepared by and signed by the defendant as a director of Unik Unggul. The defendant agreed with the plaintiff counsel's suggestion that the amount of RM6,159,000 in the draft lien agreement coincides with the amount in the statement of account. The defendant had testified that he had prepared the draft lien agreement to try 'to do an amicable settlement' with the plaintiff.

[48] For the reasons discussed above, after comparing the oral evidence of the witnesses with the contemporaneous documentary evidence, I am not convinced of the veracity of the defendant's claim that he had paid SP1 a commission in the sum of RM625,000 and paid the plaintiff the sum of RM1,212,500 from the RM10m received from the plaintiff.

[49] Accordingly, I find that on a balance of probabilities that:

(a) the plaintiff had provided the sum of RM10m to the defendant for investment in the defendant's development projects;

(b) the amount owing by the defendant to the plaintiff as at 22 July 2015 is the sum of RM6,158.783.56;

(c) the guaranteed profit rate of return payable on the outstanding sum is 10%; and

(d) the guaranteed profit return owed by the defendant to the plaintiff as at 29 October 2015 is the sum of RM168,733.80

MONEYLENDING DEFENCE

[50] The defendant has raised what Gopal Sri Ram JCA in *Pan Global Equities Sdn Bhd & Anor v Taisho Co Sdn Bhd* [2006] 1 MLJ 158 referred to as 'the moneylending defence'.

[51] The defendant pleaded that:

> the plaintiff does not have any right to claim any amount from the defendant on the grounds that the plaintiff is not a licensed moneylender and the lending was illegal and contrary to the Moneylenders Act 1951.

Learned counsel for the defendant submitted that s 5 of the Moneylenders Act 1951 ('the MLA') renders it illegal for any person not licensed under the MLA to lend money for interest. He argues that since the plaintiff does not have a moneylending licence under the Act, any agreement for profit in the form of interest is illegal and unenforceable.

[52] I have to respectfully disagree with learned counsel's interpretation. Section 5(1) of the MLA (as amended by the Moneylenders (Amendment) Act 2011) expressly states as follows:

> 5 Licence to be taken out by moneylender
>
> (1) No person shall carry on or advertise or announce himself or hold himself out in any way as carrying on the business of moneylending unless he is licensed under this Act.

It is clear from the plain reading of s 5 that it prohibits any person, who is not licensed under the MLA, from carrying on, advertising, announcing himself or holding himself out as carrying on the business of moneylending. Section 5 does not, contrary to learned defence counsel's submission, prohibit any person who is not licensed under the MLA from lending money with interest.

[53] The question before this court, therefore, is whether the plaintiff carried on, advertised, announced himself or held himself out as carrying on the business of moneylending. To answer the question, it must first be established what is 'the business of moneylending'?

What is the 'business of moneylending'?

[54] Section 2 of the MLA defines:

(a) 'moneylending' as 'the lending of money at interest, with or without security, by a moneylender to a borrower';

(b) 'moneylender' as any person who carries on or advertises or announces himself or holds himself out in any way as carrying on the business of moneylending, whether or not he carries on any other business; and

(c) 'borrower' as a person to whom money is lent by a moneylender.

[55] The Federal Court in *Ngui Mui Khin & Anor v Gillespie Bros & Co Ltd* [1980] 2 MLJ 9; [1979] 1 LNS 60 held that the question whether a person is a moneylender is a question of fact and to prove the business of moneylending requires some sort of continuity or system or repetition of similar transactions. Salleh Abas FJ in delivering the judgment of the Federal Court said:

> At the outset we wish to observe that the Moneylender Ordinance, 1951 does not apply to moneylending transactions but only to moneylenders. *It does not make every moneylending transaction illegal and unenforceable. It is only a moneylending transaction of a moneylender which is the subject-matter of the Ordinance* and must comply with its provisions on pain of being declared illegal and unenforceable by the court.
>
> ...
>
> This submission overlooks the fact that the party to a transaction who thereby becomes the creditor may or may not be a moneylender. *He is a moneylender if within the meaning of section 2 of the Ordinance he can be said to be a person 'whose business is that of moneylending'. To prove business requires some sort of continuity or system or repetition of similar transactions ...* The principle established by all these decisions, we respectfully agree, is that *the question whether a person is a moneylender or not is one of fact* and that our task is to see whether the primary or principal object of his business as distinguished from incidental parts of his business is one of moneylending. (Emphasis added.)

[56] Lord Devlin in delivering the judgment of the Privy Council in the case of *Chow Yoong Hong v Choong Yah Rubber Manufactory* [1962] 1 MLJ 74 said:

> To lend money is not the same thing as to carry on the business of money-lending. *In order to prove that a man is a moneylender within the meaning of the Ordinance, it is necessary to show some degree of system and continuity in his moneylending transactions*. (Emphasis added.)

[57] Therefore, for the defendant to succeed in his 'moneylending defence', the burden is on the defendant under s 103 of the Evidence Act 1950 to prove that:

(a) the plaintiff is a moneylender;

(b) the plaintiff carried on, advertised, announced himself or held himself out as carrying on the business of moneylending; and

(c) there is a system and continuity in the plaintiff's alleged moneylending transactions.

[58] The defendant has not provided any evidence before this court to show that the plaintiff is a moneylender or that the money invested with or loaned to the defendant was a moneylending transaction within the definition of the MLA.

[59] Accordingly, I find that the defendant has failed to establish that at the material time: (i) the plaintiff was a moneylender; or that (ii) the plaintiff carried on or advertised or announced himself or held himself out in any way as carrying on the business of moneylending.

[60] The fact that the plaintiff does not have a licence under the MLA or that profit return or interest of 10% was payable on the outstanding sum does not make the transaction between him and the defendant illegal or unenforceable. The plaintiff is not a moneylender as defined in the MLA. Therefore, he is not required to have a licence under the MLA to lend money for interest. Per the Federal Court in *Ngui Mui Khin & Anor v Gillespie Bros & Co Ltd*, the MLA governs moneylending transactions by moneylenders. It does not make moneylending transactions for interest by persons who are not moneylenders illegal and unenforceable.

[61] For these reasons, I find that there are no merits in the defendant's 'moneylender defence'.

CONCLUSION

[62] Based on the above, I find that the plaintiff has proven his claim on a balance of probabilities.

[63] Accordingly, this court allows the plaintiff's claim and orders the defendant to pay the plaintiff:

(a) the sum of RM6,327,517.36;

(b) interest of 5%pa from 5 November 2015 until full settlement of the judgment sum; and

(c) cost of RM30,000 (subject to the payment of the allocator fee).

ORDER

[64] So ordered accordingly

Plaintiff's claim allowed; defendant ordered to pay RM6,327,517.36 with interest of 5%pa and costs of RM30,000 subject to allocator.

Reported by Fatin Mohd Ismail